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the powder cases would fall in the last class as nuisances. But the tendency of the law is to abandon the nuisance theory, except where, under the surrounding circumstances, the presence of powder produces a reasonable apprehension of danger to life and property.¹⁷ This tendency is perhaps due to the increased use of explosives, which, with the better understanding of their handling, makes their presence both more familiar and less hazardous. The matter is largely regulated by state statutes and local ordinances.

A. W. B.

TORTS: JOINT TORTFEASORS: BAR OF JUDGMENT AGAINST ONE.—Though the point was but briefly considered, the case of *King v. San Diego Railway Company*¹ directs attention to the liabilities of joint tortfeasors. One of the most fertile sources for discussion in this connection is the effect of a judgment against one as a bar to an action against another for the same wrong. The subject has not always been accurately treated,² and the courts have often proceeded hastily and upon an inadequate consideration of principles and authorities.³ It may not be amiss, therefore, to trace briefly and to criticise the opposing doctrines advanced in the determination of the question.

Lord Bowen stated in 1887 that it was "not possible in that year for an honest litigant in her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation."⁴ To those of the profession who realize how true this was in 1887 and how true it is today, the English doctrine that mere judgment against one of two joint tortfeasors will bar an action against the other is especially amazing.

The oldest case in the books is Lendall's case⁵ where it was even doubted whether judgment plus execution would be a bar. But the law was determined otherwise in *Broome v. Wooton*.⁶ While only the first reason was expressly emphasized, the case is cited as resting upon three grounds: (1) A judgment renders the damages certain. (2) The liability of joint tortfeasors is joint and not joint and several. (3) Upon judgment for damages

¹⁷ *Bradley v. People* (1866), 56 Barb. 72; *Chicago W. & V. Coal Co. v. Glass* (1889), 34 Ill. App. 364; *Hazzard Powder Co. v. Volger* (1893), 58 Fed. 152.

¹ (Oct. 9, 1917), 54 Cal. Dec. 430, 168 Pac. 131.

² D. J. Kiser in 23 Cyc. at 450 says: "A judgment against one of two joint tortfeasors will preclude a recovery against the other," which is clearly not the American rule.

³ *Petticolas v. City of Richmond* (1897), 95 Va. 456, 28 S. E. 566.

⁴ *The Administration of the Law; The Reign of Queen Victoria*, Vol. I, p. 310.

⁵ (1584), 1 Leon 19, 74 Eng. Rep. R. 18, and also *Morton's Case* in the same year. Cro. Eliz. 30, 78 Eng. Rep. R. 296.

⁶ (1606), Yelverton 67, Cro. Jac. 73, 80 Eng. Rep. R. 47.

against a converter title vests in him. It will be noted that the third reason is applicable only to cases of wrongful taking or detention of goods and to this class of cases the practical application of the rule in England has been limited, though the cases and texts state it without qualification.⁷

Six years later, in Sir John Heydon's case,⁸ where several pleaded to one declaration, and several venires issued and several damages were assessed, it was held that the plaintiff could have but one execution, but had his choice *de melioribus damnis*. In *Corbet v. Barnes*,⁹ it was held that for one assault a plaintiff could recover several judgments, though he could have but one satisfaction. And in 1686,¹⁰ and again in 1806,¹¹ it was asserted that a judgment alone is never a bar until it be made productive of satisfaction to the party.

Though it might be supposed that the force of *Broome v. Wooton* had been lessened by these decisions,¹² in 1737 that case was followed, weight for the first time being laid on the third reason cited *supra*.¹³ In the next case, which arose in 1832, the question was avoided on a point of pleading,¹⁴ but in 1844 the rule of *Broome v. Wooton* was upheld on the second ground in a strong dictum by Parke, B., in *King v. Hoare*.¹⁵ Yet in a case in 1846, though the head note lays down Baron Parke's rule, Tindal, C. J., thought that satisfaction was necessary to bar a second action in trover against a second joint converter.¹⁶ Nevertheless, in 1854, *Broome v. Wooton* was again followed on the third ground stated.¹⁷

At this point came the case of *Brinsmead v. Harrison*,¹⁸ which is viewed as settling the English law. It is a very curious case. Kelly, C. B., and Blackburn and Lush, J. J., expressly admitted that *Broome v. Wooton* is wrong on principle and that it cannot be supported by the theory that title passes upon judgment alone in trover, because such is not always even the practical effect

⁷ Salmond, Torts, 4th ed., p. 83.

⁸ (1612), 11 Co. 5, 77 Eng. Rep. R. 1150. So also in *Cocke v. Jennor* (1615), Hobart 66.

⁹ (1635), Wm. Jones 377, 82 Eng. Rep. R. 198.

¹⁰ *Claxton v. Smith* (1686), 3 Mod. 86, 87 Eng. Rep. R. 55.

¹¹ *Drake v. Mitchell* (1806), 3 East 258, per Lord Ellenborough. *Broome v. Wooton* was much urged by counsel.

¹² Such was the opinion of Kent, C. J. in *Livingston v. Bishop* (1806), 1 Johns. 290.

¹³ *Adams v. Broughton* (1737), 2 Stra. 1078.

¹⁴ *Day v. Porter* (1832), 2 Moody & R. 151.

¹⁵ (1844), 13 M. & W. 494.

¹⁶ *Cooper v. Shepherd* (1846), 3 C. B. 266.

¹⁷ *Buckland v. Johnson* (1854), 15 C. B. 145.

¹⁸ (1872), L. R. 7 C. P. 547. See Ames' Select Essays, Vol. III, p. 580 n. for a further criticism of this case.

of judgment.¹⁹ But, deliberately overlooking the cases contra, they said that they were bound by the precedents to hold judgment alone a bar to a second action, strongly emphasizing *King v. Hoare*.

The third reason supporting *Broome v. Wooton* being discredited, and the first being unworthy of consideration, since it states no reason why a second joint tortfeasor should not be held for any unsatisfied portion of the damages "rendered certain" by the original judgment, the English rule must be taken to rest solely on the theory that the liability of joint tortfeasors is joint and not joint and several. This theory was supported by Blackburn, J., on the ground of *transit in rem judicatam*. Of the theory it must be said that it is an unwarranted and unjust protection to wrongdoers, produced by grafting a rule of contract liability arising by mutual assent upon the rules of tort liability arising out of a wrong for which it is the purpose of the law to give adequate remedy. In the case of a joint contract, though there are several parties on one side, it may perhaps properly be said that there is a single undertaking so integrated that if one is compelled to perform fully he may require a contribution from his fellows. But, in the case of a joint tort, though there is a single injury, by no metaphysical twist can the result that there are two wrongs be avoided, two liabilities so distinct that upon full recovery against one, though the plaintiff cannot unjustly enrich himself by a second recovery, the defendant cannot require a contribution from his fellows. It is sufficient to state these propositions to show how essentially foreign is the rule to the field of tort and how unjust its operation. Of the justification it must be said that the maxim *transit in rem judicatam* might well be urged in a second suit against the same wrongdoer, but it has no force in a suit brought for the first time against another wrongdoer in the same matter.²⁰

The tendency of the early American cases was to follow the English rule in all classes of torts.²¹ Moved, however, by the considerations just stated, there came a breaking away from the English rule, resulting in the rule that judgment alone was no bar, but that judgment plus satisfaction was a bar.²² Ultimately there developed the doctrine that only judgment plus satisfaction afforded a bar, the western states not finding it necessary to pass

¹⁹ See 8 Harvard Law Review, 173.

²⁰ *Lovejoy v. Murray* (1865), 3 Wall. 1, 16, 18 L. Ed. 129.

²¹ *Swope v. Courtney* (1801), 1 Cranch C. C. 33; *Ammonett v. Harris* (1807), 1 H. & M. 488; *Wilkes v. Jackson* (1808), 2 H. & M. 355; *Hunt v. Bates* (1862), 7 R. I. 217; Cf. *Todd v. R. Co.* (1861), 3 All. 18; *Sodousky v. McGee* (1830), 4 J. J. Marsh. 267; *Floyd v. Brown* (1829), 1 Rawle 121; See also cases in footnote 3 Wall. 3, 18 L. Ed. 129.

²² *Osterhout v. Roberts* (1827), 8 Cow. 43; *White v. Philbrick* (1827), 5 Me. 147; *Boardman v. Acer*. (1865), 13 Mich. 77; *Ashcraft v. Knoblock*

through the "halfway stage" or to pay much attention to the theoretical justification of this American rule.²³ Of the American states, Virginia alone follows the English rule,²⁴ and Michigan and Indiana are the only states which have not progressed beyond the "halfway stage," though in the others there are minor variations which it would be out of place to note here.²⁵ It should be noted that the California court has progressed very far from the English view, in one case holding that even a satisfied judgment against one is no bar to a judgment against a second joint tortfeasor where to allow the bar would be to aid the defendant to take advantage of his own wrong.²⁶

R. M. L.

WORKMEN'S COMPENSATION: "ARISING OUT OF EMPLOYMENT": "PROXIMATE CAUSE."—The Workmen's Compensation Act¹ is only applicable to injuries properly attributable to employment,²—hence the limitation of recovery to injuries, "arising out of and in the course of employment."³ The absence of final judicial interpretation of this clause, and the lack of a decisive test in its application to a particular instance is shown by two recent cases.⁴ In *Balboa Amusement Company v. Industrial Commission*⁵ the injured employee was required to remain on the plant of the company when not actually engaged in acting. While crossing the street from one part of the plant to another, as the employees commonly did, he paused in the street to converse, and was run down by the automobile of one of the directors. Compensation was denied on the ground that when he paused in the street he assumed a risk common to all mankind and so the injury did not "arise out of the employment." But on the same day the same

(1896), 146 Ind. 169, 45 N. E. 69; *Matthews v. Menedger* (1840), 2 McLean 145.

²³ *Parmenter v. Barstow* (1899), 21 R. I. 410, 43 Atl. 1035; *Lovejoy v. Murray* (1865), supra n. 20; *Elliot v. Hayden* (1870), 104 Mass. 180; *Russell v. McCall* (1894), 141 N. Y. 437, 36 N. E. 498; *Sharp v. Gray* (1844), 5 B. Mon. 4; *Cleveland v. Bangor* (1895), 87 Me. 259, 32 Atl. 892; *Fox v. Northern Liberties* (1841), 3 W. & S. 103; Compare the following California cases: *Williams v. Sutton* (1872), 43 Cal. 65; *Dawson v. Schloss* (1892), 93 Cal. 194, 29 Pac. 31; *Butler v. Ashworth* (1896), 110 Cal. 614, 43 Pac. 386; *Chetwood v. California Bank* (1896), 113 Cal. 414, 45 Pac. 704; *San Pedro Co. v. Reynolds* (1898), 121 Cal. 74, 53 Pac. 410.

²⁴ *Petticolas v. Richmond*, supra, n. 3.

²⁵ See Notes in 58 L. R. A. 410.

²⁶ *San Pedro Co. v. Reynolds*, supra, n. 23.

¹ Cal. Stats. 1913, Ch. 176. Amended Cal. Stats. 1913, chapters 541, 607, 662. Amended Cal. Stats. 1917, Ch. 585, p. 831.

² *Brinton, Ltd. v. Turvey* (1905) App. Cas. 230; *Cooper v. Wright* (1902) App. Cas. 302.

³ Cal. Stats. 1917, Ch. 585, § 6(a), p. 831.

⁴ *Kitchenham v. Steamship Johannesburg* (1911) App. Cas. 417.

⁵ (Jan. 9, 1918), 26 Cal. App. Dec. 114.